Lim Guan Eng v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor

HIGH COURT (MALACCA) – CRIMINAL APPLICATION NO 1 OF 1988
WAN YAHYA J
19 AUGUST 1988

Preventive Detention – Habeas corpus – Application for – Whether detainee has a right to be present in court – Whether court considers his presence necessary – Discretion of court – Tests applicable in determination of court – Difficulties in giving adequate instructions to counsel – Financial hardship of detainee – Submissions by parties an essential part of habeas corpus proceedings – Detainee's presence necessary to ensure fair and impartial hearing – Internal Security (Detained Persons) Rules 1960, r 93(1)

Constitutional Law – Habeas corpus – Application for – Whether detainee has a right to be present in court – Whether court considers his presence necessary – Discretion of court – Tests applicable in determination of court – Difficulties in giving adequate instructions to counsel – Financial hardship of detainee – Submissions by parties an essential part of habeas corpus proceedings – Detainee's presence necessary to ensure fair and impartial hearing – Internal Security (Detained Persons) Rules 1960, r 93(1)

The applicant, who had been detained at Tempat Tahanan Perlindungan, Taiping, under the Internal Security Act, applied for the issue of a writ of habeas corpus. He requested that an order be issued for him to appear during the hearing of the application. The respondents raised objections to the applicant's request.

Held, allowing the application:

(1) A detainee is not entitled as of right to be present at the hearing of his habeas corpus application just because he prefers to argue his own case. However, the principle does not completely shut the doors to the court's power to require the production of a detainee in cases where, having regard to the circumstances of the case, the court considers his presence necessary.

(2) The two tests to apply in determining whether the court considers his presence necessary are (a) whether the detainee had sufficient reasons to discontinue his legal representation and (b) if so, whether hearing of the habeas corpus application in the total absence of the detainee or his legal representative can lead to a failure of justice.

(3) In the present case, the detainee claimed that he experienced difficulties in giving adequate instructions to his former solicitors because the detainee camp allows only one visit by his lawyer in any given week and his lawyers are located in Malacca. Furthermore, the detainee is undergoing financial hardship. As such, the detainee is a person who is forced by circumstances to appear in person.

(4) In trials by affidavit, submissions by the parties involved usually form the fundamental and indispensable part of the proceedings. Only through submissions can a party effectively marshall his scattered facts contained in one or more affidavits into more cogent arguments to meet his opponent's case. The detainee would be deprived of this essential process of presenting his case if the court were to proceed with the hearing without his presence.

(5) Having regard to all the circumstances, the detainee's presence is necessary towards ensuring a fair and impartial hearing of his application and to proceed with hearing the case in his total absence will result in an imbalance of justice.

Cases referred to

1 *Re Greene* (1941) 57 TLR 533 (refd)
2 *Minister for Home Affairs, Malaysia & Anor* v *Karpal Singh (No 2)* [1988] 3 MLJ 85 (folld)

Legislation referred to

Internal Security (Detained Persons) Rules 1960 r 93(1)

Ng Aik Guan, Federal Counsel (*Yusof bin Dato Hj Zainal Abidin*, Deputy Public Prosecutor, with him) for the first and second respondents.

Cur Adv Vult

Wan Yahya J: On 30 July 1988, Lim Guan Eng who had been detained at Tempat Tahanan Perlindungan, Taiping, under the Internal Security Act, applied for the issue of a writ of habeas corpus. His application was scheduled for hearing on 12 August 1988. On 9 August, his former solicitor Messrs Yau Jiok Hua & Co by letter requested that an order be issued for the production of his client before this court during the hearing of that application. On the following day, acting on my instruction, the senior assistant registrar sent a reply denying this request. Almost immediately a letter was received from his solicitor informing us that they had ceased to act for the applicant and that he now wishes to appear in person. This request was confirmed in the afternoon of the same day in a telegram sent by the applicant from his place of detention in Taiping.

To enable the applicant to make a proper application, I adjourned hearing to 22 August 1988 and advised the detainee to make a proper application in affidavit form and to file and serve the same on the respondents by 17 August 1988.

On the substance of these, ie the affidavit in support filed by the detainee and the objection filed by the respondents' solicitor, I shall proceed to consider this application.

Mr Ng Aik Guan, federal counsel appearing on behalf of the respondents, based his objections on the authorities of *Re Greene*[1] and the Supreme Court's decision in *Minister for Home Affairs, Malaysia & Anor* v *Karpal Singh (No 2)*,[2] in particular to the Acting Lord President's ruling on the construction of r 93(1) of the Internal Security (Detained Persons) Rules 1960 which reads as follows:

> We are of the view that r 93(1), on its proper construction, cannot be invoked to secure the presence of a detainee in any criminal or civil court notwithstanding that it is the detainee's choice to argue his own case. The rule clearly envisages that the discretion should only be exercised in circumstances where the court itself requires the presence of the detainee, for instance, where the court is satisfied that a detainee is a necessary witness to a criminal or civil matter

before the court, or where it would occasion a failure of justice to deny the presence of a detainee to argue his own case. In the latter case, the court must be satisfied, on an application by the detainee, that there are valid reasons for the detainee to be personally present to argue his own case. From this view, it follows that prima facie the power to issue an order requiring the presence of a detained person is discretionary and that being so it shall be exercised judicially. It is a matter essentially for the court to be satisfied that it does require the presence of a detainee and that his presence is, having regard to the whole of the circumstances of the case, necessary.

It would be ostentatious for me to say that I agree as indeed I am bound by the principle of stare decisis, to abide by the decision of the Supreme Court, that a detainee is not entitled as of right to be present at the hearing of his habeas corpus application just because he prefers to argue his own case. That judgment as I understand it did not completely shut the doors to the court's power to require the production of a detainee in cases where, having regard to the circumstances of the case, the court considers his presence necessary.

So the decisive question in our present application is whether it is essential that Lim Guan Eng should be present at this hearing of his habeas corpus application. I would answer that question by applying two tests.

Firstly, whether the detainee had sufficient reasons to discontinue his legal representation and if so whether hearing of the habeas corpus application in the total absence of the detainee or his legal representative can lead to a failure of justice.

In his affidavit, the detainee claimed that he experienced difficulties in giving adequate instruction to his former solicitors because the rules in force at the detainee camp allows only one visit by his lawyer in any given week. This is further aggravated by the fact that his former solicitors, whose office is in Malacca, have to travel all the way to Taiping. He further states that having been detained since 27 October last year, he is undergoing hardship, a term which no doubt includes financial hardship.

In considering this aspect of his application, I have drawn a distinction between the right of a detainee who elects to argue his own case and one who is compelled by circumstances to act in person. I have no reason to doubt the applicant's deposition and I would place him in the category of one who is forced by circumstances to appear in person.

Having arrived at this finding I shall next consider the implication of hearing the application for habeas corpus in the absence of the applicant himself or his counsel. In trials by affidavits, submission by the parties involved usually form the fundamental and indeed indispensable part of the proceedings. Only through submissions can a party effectively marshall his scattered facts contained in one or more affidavits into more cogent arguments to meet his opponent's case. The detainee would be deprived of this essential process of presenting his case if we were to proceed with the hearing without his presence. Although he is not a qualified lawyer, the applicant states he is currently pursuing an external law degree of which his present subject is constitutional law. He also claimed that he has peculiar knowledge relating to the facts of his case.

Having regard to all the circumstances I am of the view that the detainee's presence is necessary towards ensuring a fair and impartial hearing of his application and to proceed with hearing the case in his total absence will result in an imbalance of justice.

My attention has been drawn to some English authorities in which the detainee's application to argue his own case had been refused but these cases must be considered in the perspective that legal aid, available to detainees in that country, is not accessible to our detainees.

I am unable to accept the respondents' counsel's contention that the production of the detainee in court involves a security risk and likewise I do not consider that our order to produce him will in any way defeat the purpose of his detention or render the provision of the Internal Security Act 'effete'. While in court or during his journey to and from his place of detention this applicant will remain under the same power of detention.

I would like to say in passing and with respect that I cannot perceive any authentic reason for a serious objection to be taken against the wish of a person to be heard in his own cause.

Having regard to my earlier findings and the circumstances of this application as a whole, I would accede to the detainee's request and order that he be produced before this court on the date of hearing.

Order accordingly.

Reported by *Ng Sheau Jiuan*